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INTRODUCTION

Ownership of a tract of land which abuts on a navigable waterbody entitles the owner of the land to riparian rights.[1] The number and type of these rights have apparently not been limited by the amount of riparian footage owned, nor have they generally been limited by the angle which the boundary of the property makes with the water's edge.[2] The more difficult problems arise in determining whether a particular tract in fact abuts on a navigable body of water, and what ownership interests, riparian and otherwise, exist in the tract. The first problem is to decide where the water's edge is—a matter of drawing a legal line between land and water. The second problem is to determine whether the legal description of the tract makes the legal line one of the tract's boundaries. The third problem results from having more than one ownership abutting on the same waterbody at the same place. This occurs, for example, when there is an easement for road purposes superimposed on land abutting on a waterbody. The allocation of riparian rights among or between the owner of the fee, the holder of the easement, and perhaps even the original dedicator, is a matter of some complexity.[3]

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1. *See generally* 1 FARNHAM, WATERS AND WATER RIGHTS § 60 *et. seq.* (1904) [hereinafter cited as FARNHAM].

2. *See generally* Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940); Annot., 65 A.L.R.2d 143 (1959).

3. An analogous problem is created when a riparian owner attempts to subdivide his own land in such a way as to make non-riparian back lots with access to the water body through artificially created canals. So long as the water body is sufficiently large that no riparian rights of other property owners or rights of the public are significantly affected, the status of the back lot owners is not likely to be called into question. However, when smaller water bodies such as lakes are involved, frictions may develop between the other riparian owners and the subdivider or his grantee. In this case, the Court is faced with the problem of allocating riparian use rights among competing claimants of various property interests. This problem as well as the one dealt with in the text can be expected to become more common. *See, e.g.*, Thomson v. Entz, 379 Mich. 667, 154 N.W.2d 473 (1967).

THE LINE BETWEEN LAND AND WATER: HIGH AND LOW WATER MARKS

Choosing the Water Mark

The line at which the upland stops and the water begins is referred to as the high water mark (sometimes the ordinary high water mark). The line below which the water usually does not drop is the low water mark. The space between the high and low water marks is typically called the shore, or, sometimes, the foreshore. If the waterbody is not affected by regular tides, such as an inland fresh water lake, the high water mark may be quite stable, so that as a practical matter there is only the one water line, and no shore as such. In some areas with periodic wet and dry seasons, however, there may be over an extended period of time a clearly discernible change in the level of nontidal waters. If the waterbody is subject to daily tides, such as the lower reaches of a watercourse emptying into the ocean, there usually will be clearly discernible high and low water marks, as well as a well-defined shore.

The logical point to differentiate between land and water is the high water mark. The law, both statutory and case, has generally recognized this,[4] although in some situations legal significance is attached to the low water mark.[5] Generally, then, the high water mark is the line to which the upland owner must own in order to be entitled to riparian rights.

Physical Location of the Water Mark in Nontidal (fresh water) Waterbodies

In a leading Minnesota case involving the determination of the high water mark, the court said:[6]

> In the case of fresh water rivers and lakes - in which there is no ebb and flow of the tide, but which are subject to irregular and occasional changes in height, without fixed quantity or time, except that they are periodical, recurring with the wet or dry seasons of the year - the high-water mark, as a line between a riparian owner and the public, is to be determined by examining

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4. *E.g.*, Anderson v. Reames, 204 Ark. 216, 161 S.W.2d 957 (1942) (lake with clearly marked high and low water mark); Schmidt v. Marschel, 211 Minn. 539, 2 N.W.2d 121 (1942) (riparian owner takes title only to the high water mark of a navigable lake); State v. Thomas, 173 Iowa 408, 155 N.W. 859 (1916) (lake).

5. Vermont v. New Hampshire, 290 U.S. 579 (1934) (boundary line between states); Appeal of York Haven Water & Power Co., 212 Pa. 622, 62 A. 97 (1905) *aff'd on other grounds*, 218 Pa. 578, 67 A. 866 (1907) (boundary line between counties); Flisrand v. Madson, 35 S.D. 457, 152 N.W. 796 (1915) (riparian owners have title to low water mark); Scott v. Doughty, 124 Va. 358, 97 S.E. 802 (1919) (same); Union Sand & Gravel Co. v. Northcott, 102 W.Va. 519, 135 S.E. 589 (1926) (same).

6. *In re* Minnetonka Lake Improvement, 56 Minn. 513, 522, 58 N.W. 295, 297 (1894).

> the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself.

An Iowa court has said that it is "the line to which high water ordinarily reaches," and not the line reached by the water at flood stages;[7] and it is not the line ordinarily reached "by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes . . ."[8]

The *Manual of Surveying Instructions*[9] for preparing the United States Government Survey requires that "[a]ll navigable bodies of water and other important rivers and lakes (as hereinafter described) are to be segregated from the public lands at mean high-water elevation,"[10] presumably meaning the same thing as high water mark, or ordinary high water mark. The *Manual* contains detailed instructions for locating the high-water mark:

> Practically all inland bodies of water pass through an annual cycle of changes from mean low water to flood stages, between the extremes of which will be found mean high water. In regions of broken topography, especially where bodies of water are bounded by sharply sloping lands, the horizontal distance between the margins of the various water elevations is comparatively slight, and the engineer will not experience much difficulty in determining the horizontal position of mean high-water level with approximate accuracy; but in level regions, or in any locality where the meanderable bodies of water are bordered by relatively flat lands, the horizontal distance between the successive levels is relatively great. The engineer will find the most reliable indication of mean high-water elevation in the evidence made by the water's action at its various stages, which will generally be found well marked in the soil, and in timbered localities a very certain indication of the locus of the various important water levels will be found in the belting of the native forest species.
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> Mean high-water elevation will be found at the margin of the area occupied by the water for the greater portion of each average year; at this level a definite escarpment in the soil will

7. State *ex rel.* O'Connor v. Sorenson, 222 Iowa 1248, 1251, 271 N.W. 234, 236 (1937).

8. Welch v. Browning, 115 Iowa 690, 692, 87 N.W. 430, 431 (1901).

9. U.S. BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES (1947) [hereinafter cited as MANUAL].

10. *Id.* at 230.

> generally be traceable, at the top of which is the true position for the engineer to run the meander line. A pronounced escarpment, the result of the action of storm and flood waters, will often be found above the principal water level, and separated from the latter by the storm or flood beach; another less evidence [sic] escarpment will often be found at the average low-water level, especially of lakes, the lower escarpment being separated from the principal escarpment by the normal beach or shore. While these questions properly belong to the realm of geology, they should not be overlooked in the survey of a meander line.
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> Where native forest trees are found in abundance bordering bodies of water, those trees showing evidence of having grown under favorable site conditions will be found accurately belted along contour lines; thus a certain class of mixed varieties common to a particular region will be found only on the lands seldom if ever overflowed; another group of forest species will be found on the lands which are inundated only a small portion of the growing season each year, and indicate the area which should be included in the classification of the uplands; other varieties of native forest trees will be found only within the zone of swamp and overflowed lands. All timber growth normally ceases at the margin of permanent water.[11]

A different and more complex problem is presented when the determination involves a waterbody subject to the daily rise and fall of the tides.[12]

Determining Whether the Land Description Extends to the Water Mark

The question of whether the calls of the deed run to a waterbody is, as in all boundary questions, a matter of intention of the grantor as disclosed by the language of the instrument.[13] The process of interpretation is affected by the method used in describing the realty to be conveyed. There are two basic methods, one involving direct description of the boundaries (usually called a "metes and bounds" description), the other involving indirect description using a "short-hand" label for a tract fully described in another document. This latter method usually has as its reference either the United States Government Survey or a private map or plat.

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11. *Id.* at 231-32.

12. *See* 2 SHALOWITZ, SHORE AND SEA BOUNDARIES 171-88 (1964); Gay, *The High Water Mark: Boundary Between Public and Private Lands*, 18 U. FLA. L. REV. 553 (1966).

13. *See* 1 PATTON, TITLES § 156 (2d ed. 1957).

Metes and Bounds Description

Whatever the linguistic origins of the phrase "metes and bounds,"[14] or verbal distinctions attributed to the words in the phrase, [15] the terms are commonly understood today to mean a description which details *in extenso* in the conveying instrument itself the boundaries of the land conveyed. The description must always have a stated point of beginning which can be located on the ground. This point may be a physical object or monument, natural or artificial; it may be a point at which adjacent property lines intersect; or it may be a point that can be determined only by reference to other documents, such as the government survey.

From the point of beginning, the boundaries will be described by successive courses and distances or by describing physical objects such as fences, buildings, waterbodies, iron posts, etc., which mark sides or corners, or by a combination of both. To be complete, the description must "close," that is, describe a plane figure with sides that connect to each other.

If one of the calls in the description uses terms such as "to," "on," "by," "at," or "along" a particular waterbody, the conveyed land presumably extends to the water line, and riparian rights attach.[16] A description using only courses and distances which on the waterbody side is substantially coincident with the ordinary high water mark would appear to be sufficient to convey the grantor's interest to the water's edge, and thus carry with it the riparian rights.[17]

What is the effect of a description "to the shore of Lake Blank, and thence by (or along) (or with) the shore?" If the waterbody is a tidal body, the "shore" has width (the distance between the high and low water marks), and the description is ambiguous. Under these circumstances, most courts have taken the description as intending to exclude the land which constitutes the shore proper, and thus the conveyed land terminates at the high water mark.[18]

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14. *See, e.g.*, Adams, 11 SURVEYING AND MAPPING 305 (1951).

15. *See, e.g.*, Buck v. Hardy, 6 Me. 162, 165 (1829): "By metes in strictness may be understood the exact length of each line, and the exact quantity of land in square feet, rods, or acres. . . . Metes result from bounds; and where the latter are definitely fixed, there can be no question about the former."

16. *E.g.*, Leary v. Jersey City, 189 F. 419, 428 (Cir. Ct. D.N.J. 1911); *See* SKELTON, BOUNDARIES AND ADJACENT PROPERTIES 324 (1930); CLARKE, TREATISE ON THE LAW OF SURVEYING AND BOUNDARIES §578 (3d ed. 1959).

17. McDonald v. Whitehurst, 47 F. 757 (Cir. Ct. E.D. Va. 1891); *see* Skelton, *supra* note 16, at 315.

18. *E.g.*, Montgomery v. Reed, 69 Me. 510 (1879); Niles v. Patch, 13 Gray (79 Mass.) 254 (1859); *see* Skelton, *supra* note 16, at 316. *But cf.* Wood v. Hilderbrand, 185 Md. 56, 42 A.2d 919 (Ct. App. 1945) (title extends to mean tide).

If the waterbody is a nontidal body, such as an inland lake or stream, the question takes on an added dimension. While the ordinary high water mark of fresh water bodies may change over periods of time as a result of drought or excessive rainfall, there are no regularly discernible high and low water marks and, in effect, the ordinary high water mark is the only water mark. Consequently there is no "shore" in the usual sense of a strip of land (sand or otherwise) between the high and low water marks covered and uncovered by the regular ebb and flow of the tide. In the early case of *Axline v. Shaw*,[19] the description in the deed to plaintiff's upland read in part, "thence west, about thirty-six and a half chains, to the shore of Orange Lake; thence northwesterly, with said shore of said lake, to the north line of said section one. . . ." Orange Lake was a nontidal, navigable, fresh water lake. Plaintiff sued to enjoin defendant from erecting a fence and wharf in front of plaintiff's upland, alleging that defendant's construction would interfere with plaintiff's access to the lake. Defendant answered that plaintiff was not a riparian owner. The court agreed:

> If a boundary upon the "shore" of the lake is an equivalent term to a boundary upon the "lake" itself, or the "waters of the lake," then Mrs. Axline is a riparian proprietor; otherwise, she is not. We do not think the expressions are equivalent. Her land is bounded by the shore. The shore is land . . . . Therefore, the boundary is land, and not water. . . . Mrs. Axline is not a riparian owner.[20]

In determining what constituted a "shore," the court did not discuss the difference between tidal and nontidal waterbodies.[21]

Description Referring to the Government Survey

In the original colonies land grants were typically made by metes and bounds descriptions. On May 20, 1785, the Continental Congress enacted the "Land Ordinance of 1785," establishing the United States Government Survey. This created a rectangular system of land description, and in many areas of the country it has replaced the metes

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19. 35 Fla. 305, 17 So. 411 (1895).

20. *Id.* at 310, 17 So. at 413.

21. The case is unduly complicated, and the result possibly explainable, by the fact that plaintiff apparently premised her cause of action on the State's 1856 Riparian Rights Act, rather than on her rights as a riparian owner to ingress and egress. "The building, etc., of the fence, was not sought to be enjoined as a nuisance per se, but the complainants stand strictly upon the [1856] statutory riparian rights of Mrs. Axline." *Id.* at 35 Fla. 307, 17 So. 411, 412. This act authorized upland owners on any "navigable stream, or bay of the sea, or harbor," to fill out to the channel, but only if the owner was one "owning lands actually bounded by and extending to low water mark." FLA. LAWS 1856, c. 791.

and bounds description as the usual method of conveyance, particularly for non-urban land.[22] The government survey is anchored to the land at 32 initial points throughout the United States. These points are at known latitudes and longitudes, determined by astronomical observation. From each point principal meridians (North-South) and base lines (East-West) are run, and the land area is laid out into townships (36 sections) and sections (1 square mile or 640 acres).[23]

In making a survey three steps are involved. The first is the actual surveying of the land—the measuring of the land surface with appropriate instruments and the identification or fixing of monuments. The second is the making of field notes by the surveyor; these notes constitute the written description of the survey. The third is the preparation of the official plat or map, graphically depicting the facts recorded in the notes.[24]

From the conveyancer's viewpoint, the plat is a key document. The description in a deed of conveyance will refer to a particular plat, and will identify the particular tract being conveyed by symbols referring to the tracts portrayed on the plat. The original plats (as well as the field notes) are on file in the office of the Bureau of Land Management, Department of the Interior, in Washington, D.C., (the Bureau is the successor to the old General Land Office); copies of the relevant plats are typically on file in local county recorder's offices.

It was inevitable that errors, both minor and major, would creep into a project as huge as a nationwide survey of the public domain. These errors typically reflect themselves in discrepancies between the physical dimensions of the land as portrayed on the plat, and the dimentions revealed by retracing the steps of the first surveyor from monument to monument. When there is such a discrepancy, the actual survey is controlling.[25] In other words, it is the physical evidence on the land that controls, and not the documents which purportedly but inaccurately reflect that evidence.

When the government engineer in the course of making a survey came to a large body of water, he "meandered" it. The current *Manual of Instructions* describes the procedure in these words:

> All navigable bodies of water and other important rivers and lakes (as hereinafter described) are to be segregated from the public lands at mean high-water elevation. The traverse of

22. *See generally* 1 PATTON, *supra* note 13, at 288.

23. *See generally* MANUAL OF INSTRUCTIONS (1947).

24. When a planetable is used, the topographer constructs his plat or map as he surveys, thus combining steps two and three. *See* 2 SHALOWITZ, *supra* note 12, at 85.

25. Texas Co. v. Slosberg, 112 Conn. 375, 152 A. 152 (1930); Stonewall Phosphate Co. v.

> the margin of a permanent natural body of water is termed a meander line. In original surveys, meander lines are not run as boundary lines but for the purpose of defining the sinuosites of the bank or shoreline, and for ascertaining the quantity of land remaining after segregation of the water area.[26]

The meander line, then, is the representation on the plat of the *approximate* location of the water's edge; not infrequently the line will be on the upland side of the actual water. Detailed instructions for running a meander line are given the engineer in the *Manual*.[27]

The representation of a meandered waterbody on a plat results in a nonrectangular platted tract (exclusive of the bed). In such a case, government engineers will generally subdivide the area being surveyed into as many regular rectangular units as possible, using the quarter-quarter section (40 acres) as the standard unit. Fractional units—those smaller than 40 acres and having the meander line as a boundary—left between the regular units and the waterbody will be designated as government lots, and given numbers.[28]

Government Survey Description Showing a Meander Line as a Boundary

What is the riparian status of an owner of a government lot shown on a government plat as having as one of its boundaries the meander line of a waterbody? The basic rule is that the actual boundary of the lot is not the meander line shown on the plat, but the high water line of the waterbody itself, so long as they are substantially coincident.[29] The

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Peyton, 39 Fla. 726, 23 So. 440 (1897); *See* 1 PATTON, *supra* note 13, at 390-91, and cases cited therein.

26. MANUAL 230 (1947).

27. At every point where either standard, township or sections lines intersect the bank of a navigable stream, or any meanderable body of water, corner monuments at such intersections will be established at the time of running these lines. Such monuments are called meander corners. . . . The engineer will commence the meander line at one of the meander corners, follow the bank or shoreline, and determine the true bearing and measure the exact length of each course, from the beginning to the next meander corner. All meander courses are to be taken or counted from the true meridian and will be determined with precision; "transit angles" showing only the amount of the deviation from the preceding course are not acceptable in field notes of meanders. For convenience the courses of meander lines should be adjusted to the exact quarter degree; meander lines are not strict boundaries and this method will give approximate agreement with the minute sinuosities of mean high-water elevation. Again, for convenience of platting and computation, the engineer is required to adopt turning points at distances of whole chains, or multiples of 10 links, with odd links only in the final course. In cases where the engineer finds it impossible to carry his meander line along mean highwater mark, his notes should state the distance therefrom and the obstacles which justify the deviation. MANUAL 232-33.

28. MANUAL 207-11 (1947).

29. Mitchell v. Smale, 140 U.S. 406 (1891); Lord v. Curry, 71 Fla. 68, 71 So. 21 (1916);

narrow strip of land, if any, between the water's edge and the point where the meander line would lay on the ground belongs to the lot owner, and riparian rights attach.

The rule has not been uniformly recognized, however. At an earlier date in Michigan, private ownership of land along Lake Michigan was held not to extend beyond the meander line,[30] but the upland owner had riparian rights entitling him to access to the lake across the state-owned strip between his land and the water's edge.[31] The State of Washington has taken the position that if the government plat shows a meander line to be *below* the actual high water mark, a federal patent which was issued or the right to which was vested prior to statehood conveys title to the meander line, rather than stopping at the water's edge.[32] Nebraska appears to have rejected the basic rule and makes the meander line itself the presumptive boundary.[33]

Another problem is presented by the cases in which the platted meander line is far removed from the location of any actual waterbody. This situation may arise if the water level has changed or the engineer was either grossly mistaken or committed an outright fraud. The courts have several alternatives. They can treat the meander line as the actual boundary line, using the other calls of the deed to help establish its location; they can extend the upland tract to the next quarter-section or other survey line in the direction of the waterbody; or they can give the upland owner the benefit of the error, and extend his ownership all the way to the waterbody.

Most courts prefer the first alternative;[34] a few choose the second;[35]

Arnold v. Brechtel, 174 Mich. 147, 140 N.W. 610 (1913); *see* 1 PATTON, *supra* note 13, at 297-99, for four pages of case citations.

30. Aimsworth v. Munoskong Hunting Club, 159 Mich. 61, 123 N.W. 802 (1909) *overruled by* Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930).

31. Staub v. Tripp, 248 Mich. 45, 226 N.W. 667 (1929), *rev'd on rehearing*, 253 Mich. 633, 235 N.W. 844, (1931) *on the authority of* Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930); *see also* Kavanaugh v. Baird, 241 Mich. 240, 217 N.W. 2 (1928) (denying the upland owner along Lake Michigan the benefit of title by reliction), *overruled by* Hilt v. Weber, *supra*.

32. Mercer Island Beach Club v. Pugh, 53 Wash.2d 450, 334 P.2d 534 (1959).

33. *See, e.g.*, Harrison v. Stipes, 34 Neb. 431, 51 N.W. 976 (1892); *but see* McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966 (1902).

34. *See, e.g.*, Nites v. Cedar Point Club, 175 U.S. 300 (1899); French-Glenn Livestock Co. v. Springer, 35 Ore. 312, 58 P. 102 (1899), *aff'd*, 185 U.S. 47 (1902); Security Land & Exploration Co. v. Burns, 87 Minn. 97, 91 N.W. 304 (1902), *aff'd*, 193 U.S. 167 (1904).

35. *See, e.g.*, Brown v. Clements, 44 U.S. 649 (1845) (surveyor could not arbitrarily divide quarter section); Palmer v. Dodd, 64 Mich. 474, 31 N.W. 209 (1887); Whitney v. Detroit Lumber Co., 78 Wis. 240, 47 N.W. 425 (1890); Lally v. Rossman, 82 Wis. 147, 51 N.W. 1132 (1892); (section subdivided into sections; boundary extends to next "eighth line"); Underwood v. Smith, 109 Wis. 334, 85 N.W. 384 (1901); *but see* Baackes v. Blair, 223 Wis. 83, 269 N.W. 650 (1936) (intent of government to grant land to lake controlling where it is unnecessary to cross subdivision lines).

and the third seems to be unacceptable, although it is the only choice that would appear to give the owner riparian rights.[36]

THE PLATTED STREET PROBLEM

The Dimensions of the Problem

In urban areas, it is the practice today to convey smaller parcels of land, such as those for residential use, by reference to a locally-prepared map or plat. Not infrequently the plat will be an expanded treatment of a portion of the plat of the government survey for that section, and will be anchored to the ground by reference to a described corner or monument on the government plat. If the local plat shows a meander line of a waterbody, the problems and solutions regarding riparian ownership are essentially the same as those discussed in the preceding section.[37]

In addition to subdividing the tract into lots and parcels, the local plat will often show streets and other areas dedicated to public use. Such streets may abut on a platted waterbody, either by running along and paralleling the shoreline, or by running down to and terminating at the water's edge. In either case, if the dedication of the street constitutes a vesting of the fee in the public, rather than a grant of an easement for street purposes, and riparian rights have not been validly reserved by the dedicator, the riparian rights will be in the public.[38]

If the effect of the dedication is to grant only an easement, and this is the usual construction placed upon dedications of this type,[39] the question arises whether the riparian rights attach to the easement, so that the public has them, or whether they remain in the owner of the fee. Furthermore, if the fee owner subsequently conveys lots abutting on the street, his grantees may become additional claimants to the riparian rights, based on an express or implied conveyance of the fee in the contiguous portion of the street.

Analytically, the distinction between the street that parallels the waterbody and the street that runs to and terminates in it becomes important. In the latter situation several points are undisputed. First, the waterbody end of the street is typically clearly in contact with the waterbody, so that there is no question that it is riparian upland. Secondly, the ownership of the fee in the street is determined under the

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36. *But see* Barringer v. Davis, 141 Iowa 419, 120 N.W. 65 (1909); *see also* Baackes v. Blair, 223 Wis. 83, 269 N.W. 650 (1936).

37. *See, e.g.*, Lally v. Rossman, 82 Wis. 147, 51 N.W. 1132 (1892); Blatchford v. Voss, 197 Wis. 461, 219 N.W. 100, *aff'd on rehearing*, 222 N.W. 804 (1929).

38. Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289 (1892); St. Louis v. Missouri Pac. Ry. Co., 114 Mo. 13, 21 S.W. 202 (1893); *see generally* 1 FARNHAM § 144.

39. *See* 4 TIFFANY, REAL PROPERTY § 1112 (3d ed. 1939).

usual rules, including a presumption that the conveyance of an abutting lot carries with it the fee to the center of the street, there being dry land on both sides of it.[40] Thirdly, it appears obvious that the purpose of platting the street in that fashion is to provide access from the upland streets down to and into the water. Accordingly it would follow that the dedication of the street easement should carry with it by implication the riparian rights, or at least those riparian rights that are material to the public's access to the waterbody.[41]

If the street easement runs along and parallels the shoreline, the three issues discussed above may individually or collectively enter the dispute. In the first place, it may not be at all clear that the street touches the waterbody, that is, that the water-side edge of the platted street is coextensive with the high water mark of the waterbody. This depends in substantial measure on the manner in which the plat was drawn.

Secondly, the rules governing ownership of the land underlying a street easement run into the complication that, if the street does border the water, there are abutting lots only on the one side of it. If the ownership presumption runs only to the center of the street, the original proprietor rather than the upland owner owns the land in contact with the waterbody and thus may own any appurtenant riparian rights.

Thirdly, assuming the fee in the street is owned by either the original proprietor or his subsequent grantees, the key question remains, was the purpose of platting the street in this fashion to give public access to the water from the edge of the street, or was it simply to give the public a right-of-way along the land, parallel to the water; were the riparian rights dedicated by implication along with the easement, or did they remain in the dedicator? Asking the question in this way, as the courts sometimes do, may tend to obscure the real issue. Riparian rights are not a unity—they are rights entitling a riparian owner to do a variety of acts with relationship to the water, and in some cases to the underlying bed. Some of these acts might be compatible with both the upland ownership and with the public use of the easement, others might not. The question might better be rephrased to ask: what rights ordinarily attributable to riparian ownership should logically be considered as accompanying a dedication to the public of a street easement abutting on a navigable waterbody; and what rights ordinarily attributable to riparian ownership would, if exercised by an upland riparian owner, be inconsistent with or unduly hamper such an easement?

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40. See discussion in text accompanying notes 63-71.

41. *See* Barney v. Keokuk, 94 U.S. 324 (1876); Cartish v. Soper, 157 So. 2d 150 (2d Dist. Ct. App. Fla. 1963) (street ran down to Bay); Geigor v. Filor, 8 Fla. 325 (1859) (street ran down to Atlantic Ocean) *see generally* 1 FARNHAM § 144a.

Approaches to the Problem

Because of its contemporary significance, and because of the sparsity of modern cases, the parallel street situation will be explored here in some detail, with particular reference to the three points identified above. The discussion will center around the recent Florida case of *Burkart v. Fort Lauderdale*,[42] a case which involved each of these points, and in which there were divergences of opinion among the trial court, the majority and dissenting judges in the District Court of Appeal, and the Supreme Court.

The *Burkart* case began in 1921, when the owner of a tract of land, bordering on New River Sound, a navigable waterbody, recorded a plat of the land which showed the property divided into a large number of lots and blocks, with various streets spaced between the blocks. On the east edge of the tract was a street labelled "Ocean View Drive," running between the waterbody and the first tier of lots paralleling the Sound.

The plat contained a dedication which read in part: "The streets, avenues and Ocean View Drive, shown hereon are hereby dedicated to the perpetual use of the public as thoroughfares, reserving to the [dedicator] the reversion or reversions thereof, whenever discontinued by law."[43] In addition, the dedication provided that "the riparian rights in and to the waters of New River and New River Sound opposite each lot or parcel of land fronting or abutting upon Ocean View Drive are hereby reserved to the [dedicator and its assigns], owners of said abutting lots or parcels of land."[44]

The dedicator constructed streets, pavements, and sidewalks and sold lots according to the plat. By mesne conveyances from the dedicator, the plaintiffs became the owners of several of the lots fronting on Ocean View Drive opposite the Sound. The deeds in plaintiffs' chain of title from the dedicator contained a paragraph reciting that:

> The strip or parcel of land lying between Ocean View Drive and New River Sound and New River, in front of each lot fronting on Ocean View Drive is hereby conveyed to the owner of said lot together with such riparian rights and privileges as are owned by the [dedicator].[45]

The defendant was the city within which the land was situated.

Plaintiffs and defendant became embroiled in an argument over

42. 156 So.2d 752 (2d Dist.Ct.App. Fla. 1963) *aff'd in part and rev'd in part*, 168 So.2d 65 (Fla. 1964).

43. 156 So.2d at 754-55.

44. *Id.* at 754.

45. *Id.* at 756.

their respective rights. Plaintiffs claimed they owned the narrow strip of land which now existed east of the road, and that they had the right to improve it with fill. The city denied plaintiffs' ownership, and by formal resolution of intent claimed the power to regulate the activities of persons attempting to use the water adjacent to every public street in the city. Plaintiffs then filed suit to enjoin the city from asserting any title or riparian rights with respect to the land in question. There were three basic issues to be decided.

(1.) *Does the platted street reach to the water's edge?*

The first issue was whether the city could claim any riparian rights on behalf of the public stemming from the dedication of Ocean View Drive. The answer depended on whether Ocean View Drive, as platted, was in contact with the water's edge, or whether a strip of land had been left between the street and the Sound. If the latter, the city would have no claim to riparian rights, as it would have no property abutting on the water. (In this case, control over plaintiffs' activities would have to be based on the city's general police powers. Because plaintiffs were apparently claiming the right to fill under a state statute granting that right to riparian owners, the city's police powers would presumably be ineffective to prevent plaintiffs from proceeding.)[46]

The evidence was conflicting. The plat itself appeared as shown on page 54.[47]

As noted previously, the deeds out from the dedicator of the upland lots made reference to a strip of land east of the street, and there apparently were separate deeds from the dedicator purporting to convey these strips.[48] On the other hand, there was expert testimony that the wavy lines shown on the plat immediately east of the east edge of Ocean View Drive were standard engineering symbols indicating a water boundary. These lines paralleled and appeared to touch in several places the solid line on the east side of the street. But why the solid line? If the eastern edge of the street was in fact the water, the solid line would seem to be inappropriate—it represents a land boundary, not a water one.

There are several techniques for representing the land-water boundary when a street is platted paralleling a waterbody. Each creates problems of interpretation.

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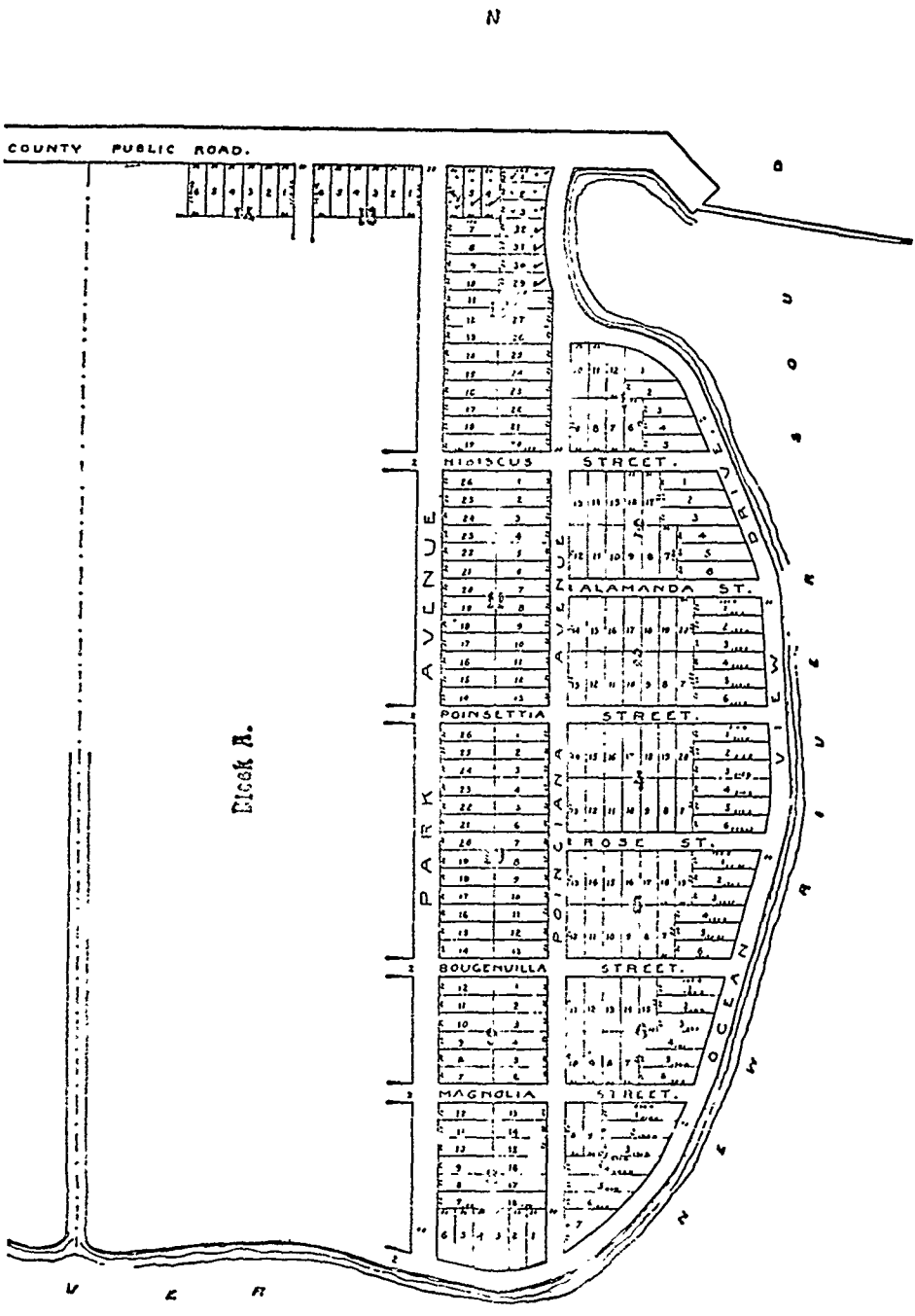
46. Plaintiffs' complaint alleged they had the right to fill in the submerged land in front of their uplands by virtue of the state's Riparian Rights Act of 1856 and supplementary statutes, presumably the Butler Bill of 1921. These acts were repealed in 1957 (FLA. LAWS 1957, 57 - 362 § 9) eleven years after the complaint was filed but three years before the trial court decision. The effect of the repeal was not considered by the courts, and the outcome of the case made the point moot.

47. *See* plat *infra* page 54.

48. *Id.* at 756. It is not clear to whom these conveyances were made.



Reproduced from 156 So.2d at 755.

(a.) *The Barclay Case Technique*

One technique is to indicate the upland edge of the street by the usual solid line, and leave the outboard edge of the street undrawn. This was the technique used by an eighteenth century surveyor named George Woods in 1784 when he platted the town of Pittsburgh along the Monongahela River. With the exception of Water Street, which lays along the bank of the Monongahela, all of the platted streets were clearly delineated, and their widths established. Water Street was shown by an upland boundary line and a name, but the water-side boundary was omitted.

In 1829, plaintiff brought ejectment in the United States District Court in Pennsylvania claiming ownership, by virtue of certain conveyances from the original dedicator, of a tract of land between the roadway of Water Street and the river's edge. The city defended on the ground that the entire strip of land between the upland line of Water Street and the river had been dedicated to the public as a street when the plat was laid out.

In reversing a judgment for plaintiff, the United States Supreme Court observed:

> There is nothing . . . on the plat which shows any limits to the width of Water Street, short of the river on the south. If a line had been drawn along its southern limit, there would have been great force in the argument that the ground between such limit and the water was reserved by the proprietors. This would have been the legal consequence from such a survey, unless the contrary had been shown.[49]

The contrary could be shown, presumably, by proper notations on the plat. Could it be shown by the statements of the plat-maker? Defendant city offered into evidence depositions of two witnesses for the purpose of establishing certain declarations by Woods at the time he made the survey. These declarations supported the idea that the street was intended to run to the low-water mark of the river. Plaintiff objected to the evidence. The Supreme Court said:

> Woods had authority to fix upon the plan of the town, and survey it.
>
> . . . .
>
> It must be admitted that the declarations of an agent, respecting things done within the scope of his authority, are not evidence to charge his principal, unless they were made at the time the act was done, and formed a part of the transaction. . . .

49. Barclay v. Howell's Lessee, 31 U.S. 498, 504 (1832).

> The southern limit of Water Street was the point of inquiry before the jury. It was a question of boundary, and governed by the same rules of evidence which are of daily application in such a case. In this view, were not the declarations of the person who fixed the boundary legal evidence? Not declarations casually made at a different time from that at which the survey was executed, but at the very time the act was done. The proof of such declarations should have been admitted by the [trial] court; because, under the circumstances, they formed a part of the transaction.[50]

(b.) *The Brickell Case Technique*

The problem of construing a platted land/water boundary had come before the Florida Supreme Court in an earlier case, *Brickell v. Fort Lauderdale*,[51] coincidentally involving the same city and the same river.

The *Brickell* case arose in 1896 when William and Mary Brickell platted the mile-square area comprising the original town site of Ft. Lauderdale. New River ran almost through the center of the area platted, in an east-west direction. On the plat, along each side of the river, there was shown a street paralleling the river, labelled North River Street and South River Street. The lines indicating the upland sides of the streets (away from the river) were straight lines, broken periodically by cross streets running at right angles to the river streets. The line denominating the river side of both North and South River streets was a solid, undulating line. The plat contained on its face a written dedication of the platted streets[52] quite similar to the one used in *Burkart*. The plat had been duly recorded.

About twenty years later, Fort Lauderdale sued Mary Brickell to enjoin her from obstructing the rights-of-way of North and South River streets by the erection of buildings and wharves along the water front. Mary Brickell's answer alleged ownership of the strip of land between the roadway of North and South River streets and the water.

At the trial, Brickell contended that the plat was ambiguous on the question of whether the platted street ran to the water's edge. At several places along the length of South River street as it was shown on the plat, the figure "40" appeared, presumably indicating a 40 foot width. On closer examination, it could be seen that the distance between the

50. *Id.* at 503-04.

51. 75 Fla. 622, 78 So. 681 (1918).

52. "[W]e do hereby dedicate [sic] to the perpetual use of the public, the streets or highways shown thereon, reserving to ourselves [and successors], owning lands abutting or adjoining the same, the reversion or reversions thereof whenever discontinued by law." *Id.* at 623, 78 So. at 681.

straight line on the plat and the undulating line was, to scale, generally about 40 feet, although it varied as the undulating line (representing the water side of the street) varied. Brickell contended that this created a sufficient ambiguity to warrant admission of extrinsic evidence of the intention of the dedicators. The trial court heard the evidence and then concluded that both North and South River streets were bounded by the waters of New River.

On appeal, this finding was affirmed. The Florida Supreme Court said:

> The lines marking the side of the North and South River streets, away from the river, are all straight lines, while those which mark the side next to the river are undulating and apparently follow the contour of the river. A single undulating line is usually used for marking a water boundary not affected by tides, while several parallel waved lines are used to mark a water boundary where tides ebb and flow; and where these are found on a plat, they should be taken to define a lot or street lying on the water, with nothing between it and the water, in the absence of anything appearing to the contrary on the plat, or in the dedication.[53]

Regarding the testimony offered by Mary Brickell, the court noted:

> There is intrinsic evidence in the plat itself, from which the true intention of the appellant at the time she made the dedication can almost conclusively be established—at least, more certainly than the testimony of witnesses given after a lapse of nearly 20 years, subject as such testimony is to mistakes caused by defective memory, personal interest however slight, and the confusion of after-acquired information or later impressions, with memory.[54]

The court was not reluctant to explain the motivation for its holding. If Mary Brickell's position was correct, "the inhabitants of one side of the city were entirely cut off from intercourse with the other, for there is no point shown on the plat where ingress and egress to and from the river was possible without permission from the owner, or by becoming a trespasser."[55] While it was presumably possible for a developer to do this, "the unreasonableness of such a plan for a city, and the improbability of one so situated becoming populated, is so great, that such intention on the part of the dedicators would have to be very

53. *Id.* at 627, 78 So. at 683.
54. *Id.* at 628, 78 So. at 683.
55. *Id.* at 628-29, 78 So. at 683.

clearly established . . . [and] any doubt as to such intention . . . should be resolved against it."[56]

(c.) *The Burkart Case Technique*

In *Burkart*, on the other hand, the platted street was shown by straight lines on *both* sides, with the line on the water side paralleled by the several wavy lines.[57] The district court of appeal pointed out that the record contained uncontradicted testimony of experts to the effect that the wavy lines were standard engineering symbols indicating a water boundary. The district court then cited *Brickell* for the proposition that in the absence of anything to the contrary, such lines "should be taken to define a lot or street lying adjacent to the water."[58] As to the fact that the platted street was bounded on both sides by solid straight lines the district court said:

> The solid, heavy line marking the east boundary of Ocean View Drive is clearly for the purpose of showing the distance from the west line of the Drive to the water. The wavy, undulating lines adjacent to the solid line, and touching the solid line from time to time with insignificant variations, make it clear that Ocean View Drive was dedicated and platted as extending to the shore of New River Sound.[59]

Concerning the testimony offered by the plaintiff's witnesses, the court noted that "the [trial] court found that there is intrinsic evidence in the plat itself from which the true intention of the maker can be almost conclusively established—at least more certainly than the statements of witnesses testifying after a lapse of . . . years . . . ."[60] The district court of appeal,[61] and subsequently the supreme court,[62] concurred with the chancellor's resolution of the evidentiary conflict in favor of the plat.

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56. *Id.* at 633, 78 So. at 684.

57. Burkart v. Fort Lauderdale, 156 So.2d 752, 755 (1963); see plat reproduced *supra*.

58. *Id.* at 756.

59. *Id.* The Florida Supreme Court concurred with the district court of appeal on this point. 168 So.2d at 67.

60. The exact words of the district court of appeal were: "The court found that there is intrinsic evidence in the plat itself from which the true intention of the maker can be almost conclusively established—at least more certainly than the statements of witnesses testifying after a lapse of nearly twenty years, since such testimony is subject to mistakes caused by defective memory and the confusion of after-acquired information or later impressions with memory" 156 So. 2d at 756. This language appears to be almost identical to that of the Supreme Court in Brickell v. Fort Lauderdale, 75 Fla. 622, 628, 78 So. 681, 683 (1918), including the reference to twenty years, which fit the facts of *Brickell*, but did not fit in *Burkart*.

61. 156 So.2d at 757.

62. 168 So.2d at 67.

(2.) *Who Owns the Street?*

Once it is determined that the edge of a street abuts on the water's edge, ownership of the street becomes important in deciding who owns the riparian rights. As discussed in a previous section, if the fee is in the public, and there has been no reservation of riparian rights by the dedicator, the riparian rights are in the public. If the public owns only an easement, the fee and perhaps riparian rights appurtenant to it are in either the original dedicator or in some successor to his interests, such as a grantee of a parcel of his upland abutting on the street.

As between the dedicator and his grantee, the grantee lot owner must base his claim for riparian rights on an express or implied conveyance by the dedicator of the entire fee in the street, thus putting the lot owner in contact with the water. If the deed from the original dedicator expressly grants the fee in the street without reservation of riparian rights, there is no problem; the fee and any attendant riparian rights are in the grantee.

However, in the more usual case, the deed will purport to convey a lot shown on the plat as bounded by the street easement, without reference to the fee in the abutting street. There is a well recognized rule that a conveyance of land abutting on an easement for street purposes will carry with it the fee in half of the abutting street (assuming the grantor owns it) unless a contrary intention is indicated.[63]

As a general proposition this rule makes good sense. It avoids the undesirable situation of having long, narrow strips of land under highway easements owned by parties who have no interest in the adjoining properties. Implicit in the rule, however, are two assumptions. First, that there are usable tracts on each side of the easement; and second, that the tracts were owned by the same person prior to the creation of the easement.[64] The first assumption is the problem here. If the street easement runs along the edge of a navigable waterbody, so that there is usable land on only one side, an application of the rule would give half the fee to the abutting upland owner, and leave the other half in the original dedicator. This would still leave a long narrow strip of land in isolated ownership, a result opposite that which the rule is designed to achieve.

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63. *See* 4 TIFFANY, REAL PROPERTY (3d ed. 1939): "[A] conveyance of land as bounded 'on' or 'by', or as running 'along' a highway, will convey to the centerline of the highway, if the grantor owns thereto, unless a contrary intention appears from the conveyance. . . ."

64. The reason for the second assumption is illustrated by the situation in which a street easement is created on a tract of land wholly owned by *A*; the easement abuts on *B*'s land, but does not include any part of it. Conveyance by *B* of his land will clearly not raise a presumption that any of *A*'s land underlying the easement is included in the conveyance.

What are the alternatives? Leaving the entire fee in the street in the original dedicator is hardly an improvement over leaving him half. The other alternative is to give the entire fee to the upland owner. This puts his land in contact with the water, and he becomes the riparian owner, absent a reservation of riparian rights by the original dedicator. This result on the whole would seem to make the best sense.

In the *Barclay* case,[65] discussed above, the Supreme Court stated that the common law rule was that the fee in the soil remained in the original owner when a public road was established over it; only an easement of use was in the public. The Court found it unnecessary to decide if this were the rule in the case before it, as a finding of an interest in the public, either the fee or an easement, would be enough to defeat the plaintiff's claim. The Court did comment in passing, however, that:

> Where the proprietor of a town deposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from the individual over whose soil a public road is established, and who continues to hold land on both sides of it. Whether the purchasers of town lots are not, in this respect, the owners of the soil over which the streets and alleys are laid, as appurtenant to the adjoining lots, is a point not essentially involved in this case.[66]

In the *Brickell* case, the trial court had held that the fee in the land over which North and South River streets were laid out was in the original dedicators, the Brickells, subject to the easement in the public.[67] The Florida Supreme Court, once it agreed that the dedicated street extended to the water's edge, simply concluded that "where a dedication to the public use is made of a street or roadway, and the same is used by the public, it is the duty of the city as trustee of the public rights in and to the streets within whose corporate limits they are, to maintain the public uses against encroachments. . . ."[68]

It is important to recognize that in both *Barclay* and *Brickell* the public's antagonist premised his case on ownership of an alleged parcel of land lying between the platted street and the water's edge at the time the street was dedicated. Once it was determined that the street, as platted, ran to the water, the case was lost regardless of who owned the fee in the street.

Similarly, in *Burkart* the plaintiffs claimed ownership of an alleged

65. Barclay v. Howell's Lessee, 31 U.S. 498 (1832).
66. *Id.* at 513-14.
67. Brickell v. Fort Lauderdale, 75 Fla. 622, 624, 78 So. 681, 682 (1918).
68. *Id.* at 633, 78 So. at 685

strip of land between the street and the water. But they further claimed the right to fill in from the upland toward the channel, a right which allegedly accrued to the upland owner by virtue of his riparian status. Thus, it was not enough to defeat plaintiffs' claim to find that no such strip existed, if in fact plaintiffs owned the land under the street abutting on the water, and if the right to fill attached to that land.

The trial court in *Burkart* and both appellate courts agreed that the street as originally platted ran to the water's edge; there was no intervening strip of land. They further agreed that any additional upland, built up by accretion *after* the 1921 dedication, belonged to the owner of the fee in the street but was impressed with the street easement. This left to be decided the question of who owned the fee in the street. The district court of appeal, noting that the courts were divided and local precedent was lacking, baldly stated that "we are of the view that . . . by virtue of their ownership of the lots fronting on Ocean View Drive, the plaintiffs own the fee underlying the Drive across its entire width."[69] The supreme court, with even briefer examination, concurred: "The petitioners undoubtedly own the fee to the street. . . ."[70] As mentioned above, this result makes good sense, and has been the one generally reached by courts that have considered the question.[71]

(3.) *Who owns what riparian rights?*

If the upland owner owns the fee in the entire street, including accretions, he owns land abutting on a waterbody, and presumably is a riparian owner. If the public owns a street easement over land abutting on a waterbody, it also can claim contact with the waterbody, and riparian status.

The trial court in *Burkart* had decided that the totality of riparian rights was in the city, and that none remained in the upland owner, at least so long as the city owned the street easement. With this position a majority of the district court of appeal was in accord:

> [T]he dedication of Ocean View Drive, which abuts upon public waters, must be construed as operating to relinquish to the public, and to merge in the public right, the dedicator's individual riparian rights to the navigable waters. It would be unreasonable and contrary to law to permit a private right to exist which could be exercised hostilely to the public right.[72]

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69. 156 So.2d at 758.

70. 168 So.2d at 68.

71. *E.g.*, Murrell v. United States, 269 F.2d 458 (5th Cir. 1959), *cert. denied*, 361 U.S. 962 (1960); Johnson v. Grenell, 188 N.Y. 407, 81 N.E. 161 (1907); Gifford v. Horton, 54 Wash. 595, 103 P. 988 (1909); Taylor v. Armstrong, 24 Ark. 102 (1863).

72. 156 So.2d at 761.

There is substantial precedent for this position. In a variety of circumstances involving similar issues, courts have often held that the right of ingress and egress accompanied the easement into the hands of the public; in effect, the upland owner's private right of access "merged" into the public right.[73] And, when the public obtained the right of access, they also obtained the right to wharf.[74]

Judge White, dissenting in the district court decision in *Burkart*, pointed out that the position taken by the majority conceivably would permit the city to erect a marina or establish a public beach along the easement:

> Assuming that these facilities would not conflict with plaintiffs' privileges possessed in common with the public, they would certainly conflict with the . . . private right of the plaintiffs to unobstructed view and enjoyment of the waterfront, anchorage and wharfage privileges and unimpeded right of ingress and egress to and from their lots and the water.[75]

Judge White's conclusion was that the riparian rights should not be treated as an indivisible package of privileges attached exclusively to the easement. The easement could be protected without endowing it with attributes "over and beyond those reasonably incident to its prescribed use,"[76] and without affording it riparian rights "extending past the land's edge."[77] He did agree with the majority, however, that "it would be inconsistent with the easement to permit the plaintiffs to fill the submerged land."[78] It should be noted that there is some inconsistency between the last statement and the argument that the city's interest did not extend beyond the land's edge.

What Judge White seemed to be saying was that the law should protect both the city and the upland owner as their interests appeared, and should "apportion" the riparian rights accordingly. This, presumably, would mean, in the case before him, giving the fee interest in any accreted land to the upland owner, while at the same time extending the city's easement to include such accretions, thus keeping the easement in touch with the water. This much the majority of the court had also

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73. *See, e.g.*, Barney v. Keokuk, 94 U.S. 324, 340 (1876); McCloskey v. Pacific Coast Co., 160 F. 794, 797 (9th Cir. 1908) (dictum); (Gastineaux Channel, an arm of the North Pacific Ocean, Alaska); Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436 (1899).

74. Barney v. Keokuk, 94 U.S. 324 (1876); Backus v. Detroit, 49 Mich. 110, 13 N.W. 380 (1882); Geigor v. Filor, 8 Fla. 325 (1859) (Atlantic Ocean); Rowan's Ex'rs v. Portland, 47 Ky. 232, 253-258 (1848); *accord*, Turner v. People's Ferry Co., 21 F. 90 (1884).

75. 156 So.2d at 764-65.

76. *Id.* at 766.

77. *Id.* at 765.

78. *Id.* at 762-63.

agreed to. Judge White, however, would further deny to *both* the public and the upland owner the right to build out from the land's edge in such a way as to interfere with each other's unrestricted right of access to the water. While the majority did not address itself specifically to that question, the clear implication, at least as Judge White saw it, was that the public would have the right to interfere with the upland owner's access, but not vice versa.

The Florida Supreme Court, on certiorari,[79] found itself in substantial agreement with Judge White, and adopted much of his reasoning, adding, however, two points of its own. One point helped; the other confused.

The helpful point followed from Judge White's suggestion that the public's use of the easement could be protected without depriving the upland owner of all riparian rights. The court agreed with this, and then clarified the point by stating that the public's use "is not limited solely to travel upon the street, but includes the general public's right to use the accreted property as a way of ingress and egress to the waters of New River Sound."[80] By thus interpreting the dedication of the original easement as including, under the circumstances, not only a public right to travel upon the street from and to connecting streets and abutting upland, but also the right to use the street as a passageway to the adjacent public waterway, the court avoided the apparent inconsistency found in Judge White's position. If the public has as part of the street easement the right to pass from the street onto the water, it would follow that the upland owner should not be able at the same time to exercise an inconsistent right, such as the right to build his own wharf over the objection of the public.[81]

The confusing point results from the significance the court attributed to the fact that the original dedicators had reserved the riparian rights connected with the lots abutting on Ocean View Drive.[82] One view of the case might suggest that the reservation was essentially irrelevant, inasmuch as the dedicators subsequently conveyed the reserved rights to the purchasers of the upland lots, who, it turned out, owned to the water's edge. In effect the two transactions were self-

79. 168 So.2d 65 (Fla. 1964).

80. *Id.* at 70.

81. See discussion *supra*; *see generally* 1 FARNHAM § 144a.

82. The language of the reservation as it appeared on the plat was: ". . . The riparian rights in and to the waters of New River and New River Sound opposite each lot or parcel of land fronting or abutting upon Ocean View Drive are hereby reserved to the New River Development Company, its successors, legal representatives or assigns, owners of said abutting lots or parcels of land." 156 So.2d at 754.

cancelling, the upland owner ending up with the same riparian rights he would have had if there had been no reservation and subsequent conveyance.

This approach, however, does not appear to be the position taken by the supreme court. That court agreed with Judge White's dissent that the majority of the district court of appeal had gone too far in conferring on the city the totality of the riparian rights. But then, instead of adopting his "apportionment" theory, the court seemed to suggest that the totality of riparian rights had, *as a consequence of the original dedicator's reservation*, remained with him and his successors, the upland owners:

> We conclude that because of the express reservation of riparian rights by the dedicator herein to itself and assigns, contained in the plat herein, these rights did not pass to the public as an incident to the street easement in Ocean View Drive.[83]

The court then went on to point out, however, that the upland owners "should be adjudged owners of . . . such riparian rights and privileges as have been reserved in the dedication, *and which do not burden the easement dedicated. . . .*"[84] The decision of the district court of appeal was therefore quashed.

An explanation of the court's concern with the fact of the reservation can be found in the way in which the *Burkart* case got to the supreme court from the district court of appeal. An earlier case, *Tarpon Springs v. Smith*,[85] had involved a *Brickell* type claim by an upland owner of an alleged strip of land between a platted street, Anclote Boulevard, and the Anclote River, a navigable tidal stream. The particular strip involved was alleged to be a marshy area nine feet wide at one end and 525 feet wide at the other. Plaintiff sought reformation of his deed from his grantor to correct the description so that it encompassed the entire strip instead of just a part.

The city of Tarpon Springs was joined in the action. The city denied that such a strip existed, and claimed that the platted street was intended by the dedicator to abut on the waterbody for its entire length. The city asked that the court so decree, and that it further decree that the city "be invested with and to have in trust for the public the dedication of all riparian rights in and to the shore space of the Anclote River . . . ."[86] Thus, the city, by affirmative counterclaim, changed the suit into a *Burkart* type action for riparian rights.

83. 168 So.2d at 70.
84. *Id.* (emphasis added).
85. 81 Fla. 479, 88 So. 613 (1921).
86. *Id.* at 490, 88 So. at 617.

The plat, which covered not only the tract involved, but surrounding areas, showed a wavy line, presumably the river's meander line, touching on the river-side of the platted boulevard at several points, and leaving a sizeable strip between the river and the boulevard at other points. At the location of the locus in quo, the plat showed a space "of considerable size" between the boulevard line and the river line.[87] The trial court found that the alleged strip in fact existed as upland, and granted reformation. The judge dismissed the city's claim for relief. On rehearing, the judge amended his decree to provide that it was without prejudice to the possible riparian rights of the city at those places where the boulevard line and the river line touched. On appeal, the Florida Supreme Court affirmed. Towards the end of its opinion, the court commented that:

> The dedication by the owner under the particular town plat, showing streets, etc., manifestly did not give any easement or other rights beyond the expressly designated limits of the streets and the incidents that are appropriate thereto. Wherever the street, Anclote Boulevard, as delineated by line and stated width, touches or approximately touches the body of the Anclote River, the riparian rights that are appropriate to a street easement were also impliedly dedicated as an incident, there being no express or implied reservation by the dedicator of such riparian rights. See Brickell v. Town of Fort Lauderdale, 75 Fla. 622, 78 South. Rep. 681.[88]

Obviously the reference to a reservation by the original dedicator was *obiter dictum*, as no reservation was involved in the case.

In *Burkart*, the supreme court was asked to take the case on certiorari. In granting certiorari, the court found implicit in its "holding" in the *Tarpon Springs* case "the principle that riparian rights do not pass as an incident to the street easement where there is an express reservation by the dedicator of such riparian rights. . . ."[89] This "principle," the court decided, was in conflict with the theory of the majority of the district court of appeal in *Burkart*, and for that matter with the theory of the dissent, both of which had attributed at least some riparian rights to the holder of the street easement. The basis, then, for the court's assumption of jurisdiction was a supposed conflict between its prior decision in *Tarpon Springs* and the district court's decision in *Burkart* on the effect of an express reservation. Once having assumed

87. *Id.* at 496, 88 So. at 619.
88. *Id.* at 501, 88 So. at 621.
89. 168 So.2d at 68.

jurisdiction by this somewhat bootstrap construction, the court was not bound to attach major importance to the reservation, but it is not surprising that it did.

In summary it should be noted that *all* the judges—the trial court, the majority of the district court of appeal, the dissenting judge, and the supreme court—were in agreement that the plaintiffs in *Burkart* did not have a good case. They did not own the upland strip free of the public's right to use it, as they claimed; and they could not wharf or fill out to the channel as they desired. The trial court and the district court's majority explained this result by giving the riparian rights, as a package, to the public; the district court dissenter's theory was to apportion the riparian rights between the parties, while denying both of them the right to wharf or fill. The supreme court justified its conclusion by apparently giving the riparian rights, as a package, to the upland owner, but then expanding the character of the public easement to include rights that looked just like riparian rights. Of the three positions, Judge White's concept of apportioning the riparian rights among the competing claimants in a way that protects the relative position of both has much to commend it. It provides a technique for protecting fully the public's present interest while at the same time preserving the upland owner's rights to both present and future enjoyment, the latter in the event of a termination of the easement; it allows for maximum flexibility in tailoring the apportionment to meet different factual situations; and it is not inconsistent with what reasonably could be expected to be the intent of the original dedicator.

Whether the intent to allocate appropriate riparian rights to the public could be negatived by express language in the dedication is a question left unanswered by the "apportionment" theory. Today, many cities require approval by an appropriate governmental board of all proposed subdivision plats. The public's interest in situations like *Burkart* could be protected by refusing approval to plats purporting to withhold or reserve riparian rights reasonably incident to the public's easement.